

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

JAIME DURAN,

Petitioner,

v.

**Civil Action No. 3:05CV46
(Judge Broadwater)**

WARDEN DOMINIC GUTIERREZ,

Respondent.

REPORT AND RECOMMENDATION

AND ORDER VACATING JULY 11, 2005 ORDER

I. PROCEDURAL HISTORY

This matter is pending before me for Report and Recommendation pursuant to June 22, 2005 Order of Referral issued by the Honorable W. Craig Broadwater, United States District Judge.

On May 19, 2005, the *pro se* petitioner, Jaime Duran, an inmate at FCI-Morgantown, filed an Application for Habeas Corpus pursuant to 28 U.S.C. §2241 asserting that the Bureau of Prisons denied him eligibility into the RDAP program and early release because he received a gun enhancement. According to the petitioner, the denial was based on a regulation which was enacted in violation of the Administrative Procedure Act [“APA”].

Because the petitioner did not pay the \$5.00 filing fee or file an application to proceed without prepayment of fees, the Court issued a Notice on May 19, 2005, advising him of his deficiency and warning him that failure to pay the filing fee or file an application to proceed without prepayment of fees within 30 days from the file date of the Notice may result in the dismissal of his case without prejudice.

The petitioner has failed to respond to the Court's May 19, 2005 Notice. Consequently, the undersigned recommends that the petition be denied without prejudice.

Further, the undersigned vacates his July 11, 2005 Order directing the respondent to show cause why the writ should not be granted.

Any party may file, within ten (10) days after being served with a copy of this Recommendation, with the Clerk of the Court, written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable W. Craig Broadwater, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

The Clerk of the Court is directed to provide a copy of this Report and Recommendation to the *pro se* petitioner and the United States Attorney for the Northern District of West Virginia as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

DATED: August 30, 2005

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE